SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~339~~ 15

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STELLA HUGHES, PETITIONER,

*vs.*

WASHINGTON.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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PETITION FOR CERTIORARI FILED JULY 12, 1966
CERTIORARI GRANTED JANUARY 9, 1967

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1966**

## No. 339

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[fol. 2]

**IN THE SUPERIOR COURT**
**OF THE STATE OF WASHINGTON**
**FOR PACIFIC COUNTY**

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STELLA HUGHES, Plaintiff,

vs.

STATE OF WASHINGTON, Defendant.

---

SUMMONS—Filed November 13, 1962

The State of Washington, to the said State of Washington Defendant .

You are hereby summoned to appear within twenty days after the service of this summons upon you, exclusive of the day of service, if served in the State of Washington, and within sixty days exclusive of the day of service if served without the State of Washington, and defend the above entitled action in the court aforesaid; and answer to the complaint of the Plaintiff and serve a copy of your answer upon the undersigned attorneys for the said Plaintiff at their office below stated, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the clerk of said Court, and a true copy of which is herewith served upon you.

Charles B. Welsh, Attorneys for plaintiff, Post Office and Office Address, 1112 W. Water St., South Bend, Washington.

Service acknowledged, Sept. 20, 1962.

Charles Bhoc Jr., Assistant Attorney General.

[File endorsement omitted]

[fol. 3]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

COMPLAINT—Filed November 13, 1962.

Comes now plaintiff and for cause of action alleges:

1.

That plaintiff individually is the owner in fee simple title and in possession of the following described real property, to-wit:

> Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N. R. 11 West W. M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west. 300 feet more or less to the line of ordinary high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

2.

That title to the above described real property was originally obtained from the United States government prior to 1889 and the westerly boundary line of said property is a line corresponding to the line of mean high tide of the Pacific Ocean, and that defendant State of Washington claims some right, title or interest easterly of said west boundary line but any such claim on the part of the State of Washington is inferior to the right of plaintiff herein.

[File endorsement omitted]

3.

That plaintiff and her predecessors in interest have been in the actual, open and notorious possession of the above [fol. 4] described real property for more than ten years immediately last past, under the claim and color of title thereto, made in good faith, and during said time have paid all real estate taxes legally assessed thereon, and during said time no other party or parties have claimed or asserted any right, title or interest in and to said property.

Wherefore plaintiff prays that the court enter judgment herein establishing the westerly boundary line of plaintiff's property to the line of mean high tide of the Pacific Ocean and as against any right, title, claim or interest of the defendant, State of Washington.

Charles B. Welsh, Attorney for plaintiff.

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*Duly sworn to by Charles B. Welsh, jurat omitted in printing.*

[fol. 5]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

ANSWER AND CROSS-COMPLAINT—Filed November 27, 1962

For answer to the complaint the defendant:

1. Disclaims all interest in the real estate described in paragraphs 1 and 2 of the complaint lying easterly of a line described as follows:

[File endorsement omitted]

Beginning at a point whose Y coordinate is 436,139.17 and whose X coordinate is 1,104.683.64, referred to the Washington Coordinate System, South Zone, and running thence on an azimuth of 1° 14′ 05″ 3412.79 feet to a point whose Y coordinate is 432,727.18 and whose X coordinate is 1,104,610.10, referred to said coordinate system.

2. Admits that it claims an interest in the lands lying westerly of the line described in paragraph 1 of this answer, and as to the lands it claims an interest in, the defendant denies all further allegations of paragraph 1, 2, and 3 of the complaint.

By way of cross-complaint, the defendant alleges:

1. It is one of the sovereign states of the United States of America, admitted to the Union on November 11, 1889.

2. The property described in paragraph 1 of the complaint borders upon the Pacific Ocean. Accretions have formed to the shore and beach of the Pacific Ocean in front of that property both before and after November 11, 1889.

[fol. 6] 3. Repeated court decisions, administrative construction, and legislative action have created a rule of property under state law whereby:

(a) All accretions formed prior to November 11, 1889, belong to the adjoining upland owner;

(b) All accretions formed after November 11, 1889 belong to the State of Washington, subject to the legislative dedication that they constitute a highway to remain forever open to the use of the public, as set forth in Laws of 1901, chapter 110; and

(c) The dividing line between accretions formed before November 11, 1889, and those formed thereafter is the line of ordinary high tide as it existed on that date, is the line which the water impressed upon the soil by covering it for sufficient periods to deprive the soil of vegetation as of

that date, and is that line which is set forth in paragraph 1 of the above answer.

Wherefore, the defendant prays that the line of ordinary high tide of November 11, 1889, as described in paragraph 3 (c) of this cross-complaint and as set forth in paragraph 1 of its answer be established and decreed to be the fixed boundary between the property of the plaintiff and the property of the defendant, and that title to all property westerly of such line be quieted in the defendant State of Washington as against any and all claims of the plaintiff.

John J. O'Connell, Attorney General, By Harold T. Hartinger, Assistant Attorney General, Attorneys for Defendant.

Office & P. O. Address: Temple of Justice, Olympia, Washington.

[fol. 7] *Duly sworn to by Don Lee Fraser, jurat omitted in printing.*

[fol. 8]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

REPLY AND ANSWER TO CROSS COMPLAINT—
Filed November 27, 1962

Comes now plaintiff and replying to defendant's answer and answering defendant's cross-complaint admits, denies and alleges as follows:

1.

Admits paragraphs 1 and 2 of the cross-complaint.

2.

Denies paragraph 3 of the cross-complaint.

Wherefore plaintiff prays that defendant's cross complaint be dismissed and that she recover according to the prayer of her complaint.

Charles B. Welsh, Attorney for plaintiff.

*Duly sworn to by Charles B. Welsh, jurat omitted in printing.*

[File endorsement omitted]

[fol. 9]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW
—February 10, 1964

The above entitled matter having come on for trial before the Court on January 23, 1964 and from the record made and arguments of counsel the court finds the following facts to be true:

1.

That plaintiff individually is the owner in a fee simple title and in possession of the following described real property, to-wit:

> Beginning at a point 1353 feet north of the line between Sections 4 and 9, Township 11 N. R. 11 West W. M and 437.3 feet west from the west line of State Highway No. 12-A thence north 226.6 feet thence west 300 feet more or less to the line of mean high tide of the Pacific Ocean, thence south 226.6 feet, thence East 300 feet more or less to beginning.

2.

That title to the above described real property was originally obtained from the United States government prior to 1889 and the Westerly boundary line of said property is a line corresponding to the line of mean high tide of the Pacific Ocean. That mean high tide of the Pacific Ocean is defined as the average elevation of all high tides as

[File endorsement omitted]

observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore as it exists at any particular time.

3.

That since the original survey and establishment of the meander line by the United States government in 1859 [fol. 10] imperceptible accretions have formed in front of the property as hereinabove described, both before and after November 11, 1889 and all of said accretions belong to plaintiff as the upland owner.

4.

That the State of Washington has no right, title, claim of interest in and to said accreted lands or in any part of plaintiff's property lying east of the line of mean high tide as defined herein.

From the Foregoing Findings of Fact the court makes the following conclusions of law: That plaintiff is entitled to judgment quieting title in her against any claim of the State of Washington in and to her property as hereinabove described lying east of the line of mean high tide of the Pacific Ocean as it now or hereafter may exist.

Done in Open Court this 10 day of February, 1964.

Warner Poyhonen, Judge.

Presented by Charles B. Welsh, Attorney for plaintiff.

Approved as to form for entry and notice of presentation waived: Harold T. Hartinger, Assistant Attorney General.

[fol. 11]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

---

STELLA HUGHES, Plaintiff,

vs.

STATE OF WASHINGTON, Defendant.

---

JUDGMENT—February 10, 1964

The above entitled action came on for trial before the court, and the court having entered Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged, And Decreed that plaintiff individually is the owner in fee simple title and in possession of the following described real property situated in Pacific County, Washington, to-wit:

Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 North, Range 11 West, W. M., and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of mean high tide of the Pacific Ocean, thence south 226.6 feet, thence east 300 feet more or less to beginning.

It Is Further Ordered, Adjudged, And Decreed that the western boundary of the foregoing property is the line of mean high tide of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high

[File endorsement omitted]

tides as observed at a location in front of the property through a complete tidal cycle of 18.6 years.

It Is Further Ordered, Adjudged, And Decreed That plaintiff's title is free and clear of any right, title, claim or interest of the State of Washington to any accreted lands [fol. 12] lying easterly of said line of mean high tide.

Done In Open Court this 10 day of February, 1964.

Warner Poyhonen, Judge.

Presented by:

Charles B. Welsh, Attorney for plaintiff.

Approved for Entry and Notice of Presentation Waived: Harold T. Hartinger, Assistant Attorney General, Of attorneys for defendant.

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[fol. 13]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

NOTICE OF APPEAL—Filed February 19, 1964

To Honorable Irene F. Kellner, Clerk of the Superior Court, Charles B. Welsh, 1112 W. Water Street, South Bend, Washington, attorney for plaintiff, and Stella Hughes, plaintiff.

You and each of you will please take notice that the State of Washington, defendant above named, hereby appeals to the Supreme Court from each and every part of the judgment dated February 10, 1964, and entered herein on

[File endorsement omitted]

February 11, 1964, in favor of the plaintiff and against the defendant.

Dated this 18th day of February, 1964.

Temple of Justice, Olympia, Washington.

John J. O'Connell, Attorney General, By Harold T. Hartinger, Assistant Attorney General.

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[fol. 16] [File endorsement omitted]

Receipt Sent.

Copy Received 3/13/64, Charles B. Welsh, Attorney for Plaintiff.

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[fol. 17]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

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STELLA HUGHES, Plaintiff,

vs.

STATE OF WASHINGTON, Defendant.

---

STATEMENT OF FACTS—Filed March 13, 1964

Before the Honorable Warner Poyhonen, Judge of the Superior Court, Grays Harbor County, sitting as Visiting Judge at South Bend, Pacific County, Washington, January 23, 1964.

APPEARANCES:

For plaintiff, Charles B. Welsh, Attorney at Law, South Bend, Washington.

For defendant, Harold T. Hartinger, Assistant Attorney General, Olympia, Washington.

As Amicus Curiae, Ted Zelaso and Robert Ingram, Attorneys at law, Aberdeen, Washington.

Whereupon the following proceedings were had and done, to-wit:

[fol. 19] Court: Hughes vs. State of Washington. I want to inquire of counsel if they are ready now or do they want me to defer it until 1:30. Whatever they wish. I will do it any way you like. I doubt if you can finish this morning but if you want to start in and plaintiff would like to make his record this morning.

Mr. Hartinger: We have a completely agreed statement of facts and I think we can easily put this in 20 minutes or so and perhaps come back after lunch and defer the argument until 1:30.

Court: That would be fine.

Mr. Hartinger: Mr. Zelasko and Mr. Ingram are appearing as Amicus Curiae.

Court: Mr. Welsh, are there any others that are appearing or desire to appear? Have you heard of any?

Mr. Welsh: Not to my knowledge. Do you want to proceed—I take it—

COLLOQUY

Mr. Hartinger: I guess I have the laboring oar all the way through. Just by way of preliminary statement. Mrs. Hughes, the plaintiff, owns property along the Pacific Ocean and she has set forth in her complaint a description of this property as it relates to the area above or landward and it is not in dispute. She claims, in addition, ownership of accreted lands, that is, the land in front of the property she described out to the mean high tide line on the Pacific Ocean. The State has disclaimed any interest in the property that the plaintiff claims lies above—what we will call—the fixed boundary of the 1889 boundary of

the tidelands. This case, as I explained to Your Honor the other day in another court, is one case which is being tried of several. I counted the similar cases and I think we have seven. Mr. Welsh can probably verify they have seven other cases that have the same problem that is [fol. 20] raised by the State's cross complaint here. In these seven cases we have stipulated as to this issue. The Court's determination here will determine the issue in those seven cases. There are three other cases—the one in Grays Harbor County and two more in this county which have the same issue. We don't have a formal stipulation. Then, of course, several other cases have the same problem. They are not filed yet, but still are on some counsel's desk one way or another. As to the State's—

Mr. Welsh: Excuse me counsel. I think we should further define the admitted facts. This is a representative case among many. Each of these cases, as well as the one at present—the original title was acquired by plaintiff or predecessors in interest prior to 1889 from the United States Government.

Court: Prior to statehood?

Mr. Welsh: Prior to statehood.

Court: As a patent from United States Government?

Mr. Welsh: Yes. So that our actual conflict is whether or not the 1889 mean high tide line governs in this case or the mean high tide at any time wherever it may be. We contend it is the latter and the State contends the former. A little bit of clarification here. There are really two problems in this case—one, the accretion problem. The other one is the rule for defining the boundary. Whether it is the 1889 boundary or whether it is the present day boundary. Technically, the boundary that the Federal Court used and the one plaintiffs use, is called the line of mean high tide. And when we use that term, we are talking about the technical definition. The State argues the line of vegetation which is a sort of mark on the ground. Those are the two issues actually involved in the

[fol. 21] thing. The Federal rule does not take cognizance of the vegetation line title-wise. As far as my reading has progressed, this is a theory used by the engineers of the State of Washington exclusively. It is used customarily by engineers—.

Court: Are you referring to the line of vegetation—

Mr. Welsh: Yes. In streams and rivers, but a vegetation line, title-wise, is a meaningless thing as I understand it from the Federal Rule.

Court: All right.

Mr. Hartinger: Well, again, we are trying this case obviously because we tried this issue in the Federal Court and where the Federal Government was owner of these ocean lands as a trustee for some Indians. In the Federal Court we were attacked on both grounds. The Federal people denied our claim to the land that is formed by accretion since statehood. They likewise argue that this mean high tide line, as used by the U. S. Coast and Geodetic Survey, was the boundary of the tideland. They insisted that the rule that the State has been using—the line of vegetation—is a rule that can be used only for rivers and lakes. Now, as to the factual basis behind the line of vegetation. The State in disposing of its tidelands has used the line of vegetation, but the facts are also that everybody else in the state has been using it. The Supreme Court has defined it as the boundary line. Our problem on this issue is the accretions. The Court of Appeals has decided the state law must be disregarded and that Federal law, as developed by the Federal Court, must be applied. Basically this is our issue.

Court: Are you ready to start putting in some evidence.

Mr. Hartinger: What I would like to do—I have talked [fol. 22] to counsel about it and he has no objections. We prepared the record by starting with requests for admission of facts. I would like to take these requests, have them marked as an exhibit and then introduce them in this fashion so that counsel and everybody else will have

some order to their files. It would save reading to the reporter quite a number of things.

Court: There are no objections to that?

Mr. Welsh: No objections to the procedure if it could be noted that plaintiffs prefer not to make a specific objection to each but simply object to the relevancy in toto.

Court: These will be defendant's exhibits?

DEFENDANT'S EXHIBITS 1-7 IDENTIFIED AND ADMITTED

Mr. Hartinger: Yes. What we have labeled Requests for Admission No. 1 is marked Defendant's Exhibit for Identification No. 1. Requests for Admissions of Facts No. 2 has been marked Defendant's Exhibit No. 2 for Identification. Request for Admissions of Facts No. 3 has been marked Defendant's Exhibit No. 3 for Identification. Request for Admission of Facts No. 4 has been marked as 4 for Identification. Defendant's 5 for Identification is Request for Admission of Facts No. 5. Now, we have one map, which is labeled "Typical Beach Section, Pacific Ocean Beach." Mr. Welsh has agreed that this could come in subject to the same objection to the other. This will be Defendant's 6.

Court: All right. These may be admitted one through six subject to the objection as to their relevancy.

Mr. Welsh: Yes.

Mr. Hartinger: I have one more item and that is the government publication entitled, "Tidal Datum Planes." And the Clerk has marked that Identification 7.

Court: It may be admitted.

Mr. Hartinger: Then we just have one more fact we [fol. 23] wish to orally stipulate to and that is the government survey of the upland adjoining this area was made in 1859.

Mr. Welsh: Agreed.

Court: You want to secure an oral stipulation by counsel that the government survey—

Mr. Hartinger: Of the area in question—

Court: Of the area in question was made in 1859.

Mr. Hartinger: Yes, Your Honor.

Court: That stipulation may show for the record.

Mr. Hartinger: All our exhibits are in.

Court: All that you have offered—there are seven of them.

Mr. Hartinger: That is the record. I would like to hand to Your Honor a trial memorandum. It is quite lengthy and then after the Court has had an opportunity to read it, I would like to explain what the case is about—what our contention is about. Why we make them and argue the matter.

Court: We may adjourn at this time and give me a little time to read this. Say two o'clock?

Mr. Hartinger: That will be fine.

Court: For oral argument.

Mr. Welsh: That is satisfactory.

Court: We will be at recess until two.

(Court recessed until 2:00 p.m. and reconvened with all parties present.)

Court: Court's in session.

(Counsel then proceeded to argue their case after which the Court made his oral decision as follows:)

COURT'S DECISION AND STIPULATION

Court: I think I would be regarded as rather naive if [fol. 24] I failed to appreciate that we are involved in a question in all probability is not going to end here with a decision of the Superior Court of Pacific County. Frankly we are in an area—I don't know as to the circumstances of the parties involved of this particular litigation; an area in which there should be some day at least a final adjudication as to the rights of the people so that we will know where we are for sure and what we own and we don't own; who owns what and who doesn't. With

that in view, I expect that about all I am probably doing today is deciding who has to take the initiative of an appeal. This may seem—I am aware of the importance of the problems involved here. This may seem somewhat of a hasty decision in such an important case. I could postpone it by taking the matter under advisement and to delay a month or two or by writing a memorandum opinion on it; I would take the matter under advisement and write a memorandum opinion if I felt there was any real purpose being served in doing so. I have had some experience with these problems. I never tried one as a lawyer. I represented private clients on two or three occasions with the State of Washington on the other side. The State backed up a little and agreed to sell on rather reasonable terms or give my client a 99-year lease for a dollar or some such thing that made the lawsuit unnecessary and I never did get to court on the two or three matters which I represented private clients in my lawyer days. As a State legislator in 1947 and 1949, I gave the problem considerable thought. In those days I was quite concerned by reason of the fact some of my constituents out in the Oyehut and Ocean Shores way were quite concerned in getting something accomplished. I gave the matter considerable study. I have had a number of conversations with representatives in the Land Department of the State. One of the Superior Court cases in the [fol. 25] exhibit is one of mine out of Grays Harbor County in '58. That is the Sunshine Mining Co. vs. Union Gas Development. I don't know if it is particular in point. I think all I had to do was decide where the line of vegetation had been on a certain date because under state law, title rested on the state permit and it was a factual question and neither party in that litigation was questioning the state's right or title or could they by reason of whatever rights they had, rested on those permits. I watched with considerable interest the Ocean Shores development. The lawsuit in Minard quiet title action involved several

miles of ocean front. That didn't come before me. It was settled. Of course, that Superior Court decision established ownership in the State of Washington. I have never felt it was truly an adversary proceedings. What Minard did—he brought a lawsuit. I think part of the proceedings there was an effort to shut out some squatters out there, who probably had good title by adverse possession if Minard was owner of the property and probably had no rights if the land belonged to the State during all of those years. I don't want to go into the merits except this comment, if Minard owned the property actually, probably it wasn't a bad deal for him. Litigation through the Supreme Court of the United States might have cost him a lot of money. If there wasn't any question about the state's ownership then, then it was state property beyond all question and the propriety of a sale of several miles of beach for $40,000 might be open to question. I will say I have given the matter some little study. I have thought about it from time to time during probably a third of my lifetime. Not continuously but have been aware of it. With that explanation, I hope that the decision won't be regarded as being a hasty one. It is a rather interesting circumstance to me that this being 1964, it is about 75 years since statehood and that our State Supreme Court [fol. 26] would not have been called upon specifically and directly to decide the questions involved here and particularly that question of moving line. It is not in the record—is pure speculation on my part—I have a feeling that what has happened many times and what actually did in two or three of my clients that the State was inclined to back away and so the problem has never been settled by our State Supreme Court. With the result that we have had 74 years of development of a body of State law based on departmental decisions, administrative determination, attorney general's opinions, opinions and decisions of Superior Courts for the most part and a few by our State Supreme Court to kind of get rather close

to the question involved here, but doesn't decide it squarely. We have had, as Mr. Hartinger said, a development of a body of State law or local rule—I guess we can call it a change or modification in common law. They all mean the same thing. We are met with the argument that now we ought not to change that because of the upsetting effect a different decision would have. I don't believe that there is any question that a state may develop its own body of law to change the common law. I think that could be conceded. I don't think anyone would argue very seriously to the contrary. Common law can and does change. The problem here is whether—the problem here is a question of jurisdiction. Whether the state law does apply or whether Federal law should be applied. I just don't see any escape from the decision in the Borax Consolidated vs. Los Angeles case in 296 U.S. 10. That is a 1935 case where 28 years ago the opinion was written by Chief Justice Charles Evans Hughes and the Ninth Circuit Court of Appeals decision in United States vs. the State of Washington in 1961, 26 years later, where the decision was written by Justice Hamley, who was formerly a member of the Supreme Court of the State of Washington, [fol. 27] that is, the 294 F.(2d) 830 case. I think those cases decide specifically the question that is involved here. The Borax case, now 28 years old, hasn't been departed from that I can find. And the Sampson Johns' case, the Ninth Circuit Court case in '61, was a Federal Case. He was a resident of the state. The State had a lawyer, who for many years felt that the Washington rule—the local law—should be applied. The Circuit Court reversed him and specifically held against the position of the State on both phases of the question. In the Borax case Justice Hughes said—this was quoted in the Sampson Johns' case —"Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent

affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." A number of cases are cited in support of that doctrine. And in that case, of course, the Court in the opinion was the enunciation of the Federal rule—the boundary between tidelands and uplands is the mean high tide line. Such to be determined by the average of 18.6 years. That is the holding of the Supreme Court of the United States which the Circuit Court quoted in the Sampson Johns' case. They went on to follow the holding in the Borax case to the effect that the line is the line of mean high tide of the average elevation as observed at a location through a tidal cycle of 18.6 years. [fol. 28] I was personally disappointed that the Supreme Court of the United States denied the certiorari in the Sampson Johns Case. I was hoping they would take jurisdiction and I am aware that no particular inference ought to be drawn from the fact that they denied certiorari except possibly that if the Circuit Court of Appeals had departed from the rule announced in Borax and had held in favor of the State of Washington rather than in favor of the Federal Government, I just can't help but feel the Supreme Court of this nation would have wasted no time in granting the certiorari and taking another look at the problem. Now, whether these decisions are right, whether the court was right in the Borax Case and again in Sampson Johns Case, that's what it did and is something that I can't be concerned with. All I'm saying is it seems to me they did say it. I feel I am bound by it. I can't do very much more about it. There are people understandably who would not be happy with the rule. I think

the opinion of Judge Chambers in the Circuit Court case is worth reading. It is a short paragraph and may express the feelings of a great many of us. Judge Chambers said, "As a District Court thought, I think that the question of the line of title ought to be decided by state law, but as I read Borax Consolidated Ltd. vs. Los Angeles, 296 U. S. 10, I think the road sign points to the line being treated as a Federal question, so I concur." He is bowing to the inevitable. That is just the feeling I have. I know that nobody has ever worked harder on this case or cases involving this question than Mr. Hartinger. He has put a great part of his lifetime into it and it looks like he is going to spend some more. If he can persuade the Federal Court and the Supreme Court of the United States to take another look at it, more power to him. I am going to grant the plaintiff's judgment on both issues—as to the [fol. 29] title to the accretions and as to the line.

Mr. Hartinger: I don't propose to call Your Honor back. It is just as easy to go over to Montesano and I would like to stipulate that the judgment may be signed by Your Honor in Montesano.

Mr. Welsh: Certainly.

Court: I have that right anyway.

* * * * * * *

[fol. 30] JUDGE'S CERTIFICATE

State of Washington,
County of Pacific, ss.:

I, Warner Poyhonen, one of the Judges of the Superior Court of the State of Washington and the Judge before whom the above-entitled cause was tried, do hereby certify:

That the matters and proceedings embodied in the foregoing Statement of Facts are matters and proceedings occurring at the trial of said cause, and the same is hereby made a part of the record herein.

I do further certify that the same contains all the material facts, matters and proceedings heretofore appearing in said cause and not already a part of the record herein.

I do further certify that 7 exhibits, marked Defendant's Exhibits 1 through 7, hereto attached, are all the exhibits admitted in evidence upon the trial of said cause.

Done in Open Court this 8 day of April, 1964.

Warner Poyhonen, Judge.

[File endorsement omitted]

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[fol. 31]

Pacific County

Judge Warner Poyhonen

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

En Banc

---

STELLA HUGHES, Respondent,

v.

THE STATE OF WASHINGTON, Appellant.

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OPINION—Filed January 20, 1966

WEAVER, J.—The questions of law generated by this appeal spring from Article 17 of the state constitution, its historical background, and its interpretation, legislative, administrative, and judicial.

Article XVII—TIDE LANDS

§1 DECLARATION OF STATE OWNERSHIP. The state of Washington *asserts its ownership* to the beds and shores of all navigable waters in the state *up to and including the line of ordinary high tide, in waters*

> *where the tide ebbs and flows,* and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided,* that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.
>
> §2 DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: *Provided,* the same is not impeached for fraud. (Italics ours.)

Plaintiff, Stella Hughes, is the owner of an upland tract of land on the Long Beach Peninsula near Ocean Park, Pacific County, Washington. Title is deraigned from a [fol. 32] patent issued prior to statehood. In this action to quiet title plaintiff alleges[1] that the west boundary of the tract is described as

> the line of *ordinary high tide* of the Pacific Ocean. (Italics ours.)

She prays that the court establish the westerly boundary of her property to be "the line of *mean high tide* of the Pacific Ocean." No time for the determination is indicated.

The trial court found that since the original survey and establishment of the meander line by the United States government in 1859, imperceptible accretions have formed in front of plaintiff's property, both before and after November 11, 1889, and that all the accretion belongs to plaintiff as upland owner. The state does not claim the accretion prior to 1889, the date of its admission to the

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[1] Plaintiff alleges ownership of the following described property:

Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N. R. 11 West W. M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of *ordinary high tide* of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning. (Italics ours.)

union. It contends, however, that the present western boundary of plaintiff's land and the present eastern boundary of the state's tidelands is the line of "ordinary high tide" as it existed November 11, 1889. In its answer and cross-complaint, the state alleges that this line on November 11, 1889 was described as follows:

> [fol. 33] Beginning at a point whose Y coordinate is 436,139.17 and whose X coordinate is 1,104,683.64, referred to the Washington Coordinate System, South Zone, and running thence on an azimuth of 11°14'05" 3412.79 feet to a point whose Y coordinate is 432.727.18 and whose X coordinate is 1,104,610.10, referred to said coordinate system.

The state appeals from a judgment dated February 10, 1964, which determines:

> that the western boundary of the foregoing property [of plaintiff] is the line of *mean high tide* of the Pacific Ocean *as it now or hereafter may exist*, which line is the average elevation of all high tides as observed at a location in front of the property through a complete tidal cycle of 18.6 years. (Italics ours.)

We point to the possible difference between "ordinary high tide," as set forth in the constitution, and "mean high tide as it now (February 10, 1964) or hereafter may exist," as determined by the trial court. We also point out that the superior court determined a possible changing or shifting western boundary for plaintiff's property.

This appeal brings into sharp focus the following questions: (a) When did title to the tidelands vest in the State of Washington? (b) What is the *nature* of the State's ownership? (c) What is the *extent* of the State's ownership? i.e. what is the dividing line between the upland property and the state-owned tideland? (We are not concerned with the seaward line in the instant case. See the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (1958 ed.)). (d) Is the dividing line a fixed line or is it a chang-

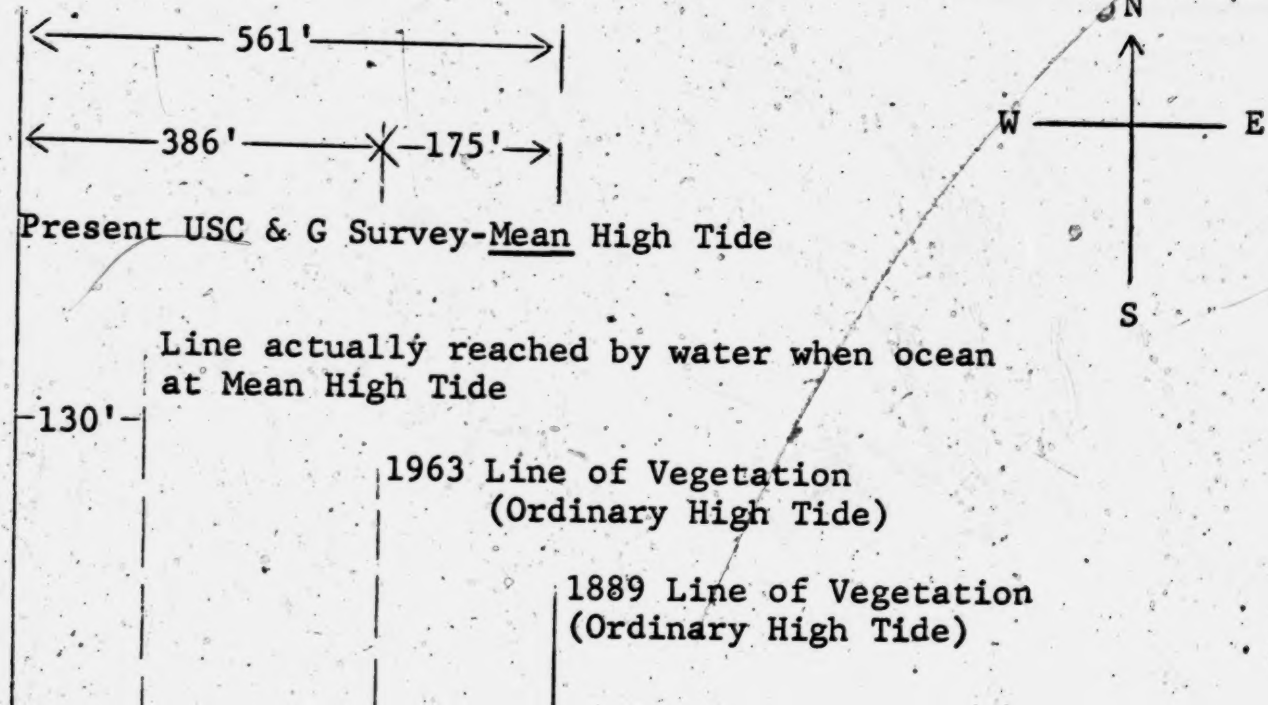
[fol. 34] ing line depending upon accretion or reliction? (e) If a fixed line, as of what date should it be established? The trial court said in its oral opinion:

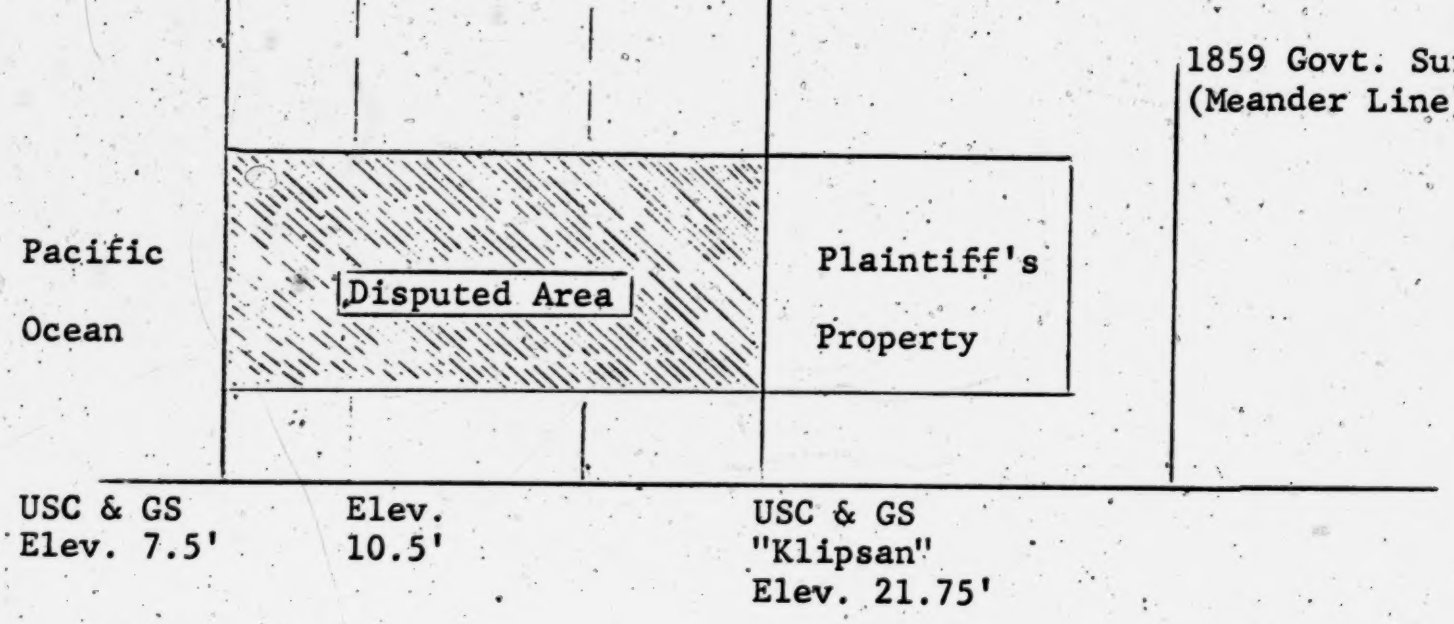
> It is a rather interesting circumstance to me that this being 1964, it is about 75 years since statehood and that our State Supreme Court would not have been called upon specifically and directly to decide the questions involved here and particularly that question of moving line."

Undoubtedly there are other questions that might arise, be we deem the foregoing sufficient to present the issues of the instant case.

For the sake of clarity and in order to illustrate the facts we set forth the following sketch, prepared by the court from exhibits in the record. It is not drawn to scale.

(See opposite) ☞


561'
386'
175'
Present USC & G Survey-Mean High Tide
N
W
E
S
Line actually reached by water when ocean at Mean High Tide
130'
1963 Line of Vegetation (Ordinary High Tide)
1889 Line of Vegetation (Ordinary High Tide)


1859 Govt. Survey
(Meander Line)
Pacific
Ocean
Disputed Area
Plaintiff's
Property
USC & GS
Elev. 7.5'
Elev.
10.5'
USC & GS
"Klipsan"
Elev. 21.75'

[fol. 36]

## History of Constitutional Provision

The questions presented by the instant case are not new. As early as 1854 the territorial legislature granted owners of property abutting navigable waters the right to build wharves, under certain conditions, and to "extend them so far into said waters or water courses as the convenience of shipping may require," and to maintain them for not more than 20 years.[4]

On numerous occasions the territorial legislature memorialized Congress to grant tidelands to the territory so that they might be sold and the funds used for internal improvements,[5] or to grant them to certain towns and cities to aid in their development.[6] In 1873 the territorial legislature passed an act confirming the title of the Seattle and Walla Walla Railroad and Transportation Company to the tidelands south of King Street in Seattle and around Elliott Bay "from extreme high to extreme low tide, and to deep water . . . derived by deed from the city of Seattle to the said company dated August 19, 1873," provided the first section of 15 miles of railroad be constructed within three years. The territory purported to convey such title "as would otherwise belong to and vest in the state, upon the admission of Washington Territory into the Federal Union as a state."[7]

[fol. 37] One cannot read the record of the proceedings of the state constitutional convention[8] and the newspaper and editorial comment published during the convention

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[4] Laws of Washington Territory 1854, p. 357.

[5] Laws of Washington Territory 1869, p. 527.

[6] Laws of Washington Territory 1859, p. 500 (Olympia).
Laws of Washington Territory 1871, p. 220 (Olympia).
Laws of Washington Territory 1871, p. 213 (Seattle).

[7] Laws of Washington Territory 1873, p. 577.

[8] The Journal of the Washington State Constitutional Convention, 1889, p. 809 *et seq.* (Book Publishing Co. 1962).

(*Yelle* v. *Bishop*, 55 Wn.2d 286, 292, 347 P.2d 1081 (1959)), between July 4 and August 22, 1889, without concluding, as do the historians of that period,[9] that the most vexing and politically sensitive problem confronting the convention was that of harbors, and the control, use, ownership, and disposal of the tidelands of the new state to be. No other problem was of more vital concern to the economic development of the state, for the tidelands in front of Seattle and other cities on Puget Sound and the ocean were of tremendous value.

During the convention suggested constitutional proposals ranged from a declaration of inalienable state ownership of tidelands with limited leasing privileges, to no declaration at all, thus leaving all questions of tideland ownership and use to the whim of future legislatures. The major source of difference arose from whether the state, the cities, or private individuals and corporations should control the water front. Generally, five groups brought pressure to bear upon the 75 members of the convention: (1) the owners of upland property; (2) the occupiers or preemptors [fol. 38] of tidelands who had placed improvements thereon; (3) land speculators; (4) cities and towns; and (5) the railroads. The conflict of interests was sharp and the debates reported were acrimonious.

It was not until August 22, 1889, the final day of the convention, that Article 17 (quoted *supra*) was adopted.[10] The article is, in truth, a Janus-like compromise of the contentions of the various schools of thought in the constitutional convention. Although it asserts state ownership of tidelands and disclaims all right to tidelands theretofore patented by the United States, it makes no declara-

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[9] See Nesbit, "He Built Seattle" p. 308 *et seq.* (University of Washington Press, 1961). This is a biography of Thomas Burke, Chief Justice of the Territorial Supreme Court, 1888-1889.

[10] Austin Mires (a member of the constitutional convention), "Remarks on the Constitution of the State of Washington," The Washington Historical Quarterly, Vol. 22, No. 4, Oct. 1931, p. 276.

tion of policy to govern the use or disposition of such lands. The convention left the use and sale of state-owned tidelands to the politics of future legislatures and to the interpretation to be given Article 17 by the Supreme Court.

Before discussing our decisional law, it is necessary to review briefly the tideland statutes subsequent to statehood, the definition of "the line of ordinary high tide," and the administrative and superior court interpretations of the statutes.

## Tideland Statutes Subsequent to Statehood in 1889

Since Article 17 was a compromise of the various interests represented in the constitutional convention, it is not surprising to find tideland politics carried forward into [fol. 38a] subsequent legislative sessions.

The early statutes provide for the survey, classification, and appraisal of state-owned tidelands[11] and set forth the method and manner of sale or lease thereof. Oyster beds were "withdrawn and reserved from sale or lease for the purpose of establishing a natural oyster bed reserve."[12] A railroad was granted the right to maintain tracks and wharves on tidelands.[13] Although abutting property owners were given a preferential right to purchase tidelands, one having placed improvements thereon prior to March 26, 1890 had the exclusive right to purchase if used for "commerce, trade, residence, or business."[14] Laws of 1899, ch. 83, § 1, p. 132[15] was the first legislative recognition of accretion to tidelands. The statute provided:

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[11] Laws of 1889-90, p. 431 731; Laws of 1891, p. 403; Laws of 1893, ch. 17, p. 26; ch. 49, p. 241.

[12] Laws of 1891, p. 366.

[13] Laws of 1897, ch. 88, p. 228.

[14] Laws of 1897, ch. 89, § 45, p. 250.

[15] Laws of 1899, ch. 83, § 1, amending Laws of 1897, ch. 89, § 51; reenacted by Laws of 1927, ch. 255, § 123; now codified as RCW 79.01.492. The reenactment made a few minor changes in the 1899 wording. See *Ghione* v. *State*, 26 Wn.2d 635, 650, 175 P.2d 955 (1946) for the changes.

> That any accretion that may be added to any tract or tracts of tide or shore lands *heretofore sold or that may hereafter be sold by the state shall belong to the state.* (Italics ours.)

The statute treats with accretion to *tidelands* "heretofore [fol. 39] sold or that may hereafter be sold" by the state. The accretion belongs to the state. The statute does not purport to determine ownership of accretion when the tidelands have not been sold. See *Strand* v. *State,* 16 Wn.2d 107, 129, 132 P.2d 1011 (1943). We do not construe the statute in any sense to be a waiver by the state of its interest in tidelands. It is more logical to conclude that this is a legislative recognition of the state's claim to all accretion after 1889 whether the tidelands be sold or not. The statute is at least indicative of the legislative intent to claim accretion for the state under the limited circumstances identified.

It was not until Laws of 1901, chapter 105, p. 217, and chapter 110, p. 225, that the *public's* interest in tide and shore land received legislative recognition. Chapter 110, § 1 provides:

> That the shore and beach of the Pacific Ocean, including the area or space lying, abutting or fronting on said ocean *and between ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be)* from the Columbia river or Cape Disappointment on the south to a point three hundred feet southerly from the south line of the government jetty on Peterson's Point, State of Washington on the north, be and the same *are hereby declared a public highway forever,* and as such highway shall remain forever open to the use of the public. RCW 79.16.170. (Italics ours.)
>
> No part of said shore or beach shall ever be sold, conveyed, leased or otherwise disposed of. RCW 79.16.171.

The statute declares certain shore and tidelands a "public highway forever."[16] It does not purport to reserve *all* [fol. 40] state-owned tideland in the vicinity as a public highway. We point out that the public highway is not described as abutting upland property; it is defined as "abutting or fronting on said ocean." Its seaward boundary is "extreme low tide"; its inland boundary is the line of "ordinary high tide . . . as such shore and beach now are [1901] or hereafter may be." Assuming that there had been accretion between 1889 and 1901, it does not follow that this statute disclaims state ownership therein. State-owned land may still remain between the inland boundary of the "public highway" (ordinary high tide as such shore and beach now are) and the 1889 line of ordinary high tide. It might, of course, be subject to sale to the abutting upland owner or others as the statutes provide. True, the boundaries of the reserved public highway may shift seaward because of accretion (a question we do not decide), but such move would in nowise affect the inland boundary of state-owned lands. It would simply preserve the prime portion of the beach for the public.

Our interpretation of Laws of 1901 (RCW 79.16.170 [fol. 41] quoted *supra*) is fortified by Laws of 1929, chapter 78, which provides:

> The commissioner of public lands is hereby authorized to offer for sale and sell in the manner herein-

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[16] The highway created is not a road intended for automobile traffic. It is a recreational area. As Judge Fullerton explained in *Williams Fishing Co.* v. *Savidge*, 152 Wash. 165, 181, 277 Pac. 459, 464 (1929):

> " . . . Prior to the year 1901, when the legislature declared the tide lands to be a public highway, the beach had become a favored resort for the people of the state who were seeking rest and recreation, and, as I gather from the surroundings and the current history of the times, the purpose of the legislature was, not so much to establish a thoroughfare, as it was to preserve the beach as a recreational ground for the use of the public. . . . "

after provided, all, or any portion of, the following described lands:

[described]

*lying above and on the land side of the inner boundary of the highway reservations made by chapter CV [105] and chapter CX [110], Laws of 1901,* same being a line of ordinary high tide as the same is now located or as it may hereafter exist. (Italics ours.)

Thus, the legislature recognized an "inner boundary of the highway reservation" and authorized the sale of lands lying inland of this inner boundary of the highway reservation.[17]

A fundamental error of the trial court in the instant case is the application of the 1901 and 1929 statutory language to "a line of ordinary high tide *as the same now is or as it may hereafter exist*" (italics ours) to a factual situation to which it has no application.

## The Nature of Tides

Tides are the result of gravitational attraction of the moon and sun upon the waters of the earth. Their heights vary with the changing positions of the moon, sun and earth in relation to each other. Changes in winds, barometric pressures, and the freshets or droughts of rivers, [fol. 42] together with the geography of the locale, will cause tides to be higher or lower than predicted by the United States Coast and Geodetic Survey. There are usually two high and two low waters or tides a day. They

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[17] Laws of 1963, chapter 212, p. 1058 provides that that portion of the public highway established by Laws of 1901, chapters 105 and 110 "lying between the line of vegetation and the line of mean high tide, as such lines now are or may hereafter be, is hereby declared *a public recreation area* and is hereby set aside and forever reserved for the use of the public." (Italics ours.) We believe this is the first legislative use of the terms "line of vegetation" and "mean high tide" as distinguished from "ordinary high tide."

may be designated, lower low water, low water, high water and higher high water. The datum (plane of reference) from which the heights of tides are calculated on the Pacific Coast (with the exception of Balboa, Panama) is the mean or average of the lower of the two low waters of each day.[18]

In Marmer, *Tidal Datum Planes*, p. 86 (U.S. Dept. of Commerce, Coast and Geodetic Survey, Special Pub. No. 135, rev. ed. 1951), it is stated:

> In view of the variations to which the height of high water is subject, mean high water [tide] at any place may be defined simply as the average height of the high waters at that place over a period of 19 years.

In its findings of fact, the trial court stated:

> mean high tide of the Pacific Ocean is defined as the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore *as it exists at any particular time.* (Italics ours.)

[fol. 43] Since the line of "mean high tide" is an average over a period of years of the two daily high tides, one being higher than the other, it is apparent that the higher high tide will wash inland from the line of "mean high tide." This is illustrated by an exhibit showing the observed high tide on January 23, 1963 at a point a few feet south of plaintiff's property to have been 130 feet inland from the line of predicted "mean high tide." The difference in elevation was 3 feet. In the instant case, in front of plaintiff's property the distance between the line of "*ordinary*

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[18] Bowditch, American Practical Navigator, p. 252, U.S. Navy Dept. Hydrographic Office, No. 9 (1943); 1965 Tide Tables, p. 7, U.S. Dept. of Commerce, Coast and Geodetic Survey; *See United States* v. *California*, —— U.S. ——, 14 L.ED. 2d 296, 85 Sup. Ct. 1401 (May 17, 1965), in which the court equated the "line of ordinary low water" with "mean lower low water." Shalowitz, 2 Shore and Sea Boundaries 255 (U.S. Dept. of Commerce 1964).

high tide" in 1889, as defined by the state, and "*mean* high tide," as *presently* determined by the United States Coast and Geodetic Survey and adopted by the trial court, is 561 feet; the difference in elevation is 14.25 feet.

The problem presented is pinpointed by one author as follows:

> Boundaries determined by the course of the tides involve two engineering aspects: a vertical one, predicated on the height reached by the tide during its vertical rise and fall, and constituting a tidal plane or datum, such as mean high water, mean low water, etc.; and a horizontal one, related to the line where the tidal plane intersects the shore to form the tidal boundary desired, for example, mean high-water mark, mean low-water mark. . . . The first is derived from tidal observations alone, and, once derived (on the basis of long-term observations), *is for all practical purposes a permanent one.* Shalowitz, 1 Shore and Sea Boundaries 89 (United States Department of Commerce 1962). (Italics ours.)

"Mean high tide" is measurable and determinable.

On the other hand, "the line of ordinary high tide" as used in Article 17 of the constitution is not a term of techni- [fol. 44] cal exactness. It is indefinite at best and an oversimplification of a phenomenon inherently complex and variable. In the absence of any indication to the contrary, we deem the word "ordinary" to be used in its everyday context. The "line of ordinary high tide" is not to be fixed by singular, uncommon, or exceptionally high tides, but by the regular, normal, customary, average, and usual high tides. One cannot sit and watch the tide reach its stand at different elevations on each turn as it ebbs and floods without realizing that a line to be fixed by it must be based upon an average. Thus the line of "ordinary high tide" is the average of all high tides during the tidal cycle.

Administrative and Superior Court Interpretations

The record before us supports the conclusion that the commissioner of public lands has established the common boundary between upland property and state-owned land to be the line of ordinary high tide where it existed November 11, 1889. Over the years, 73 lawsuits affecting 322 private ownerships have been instituted against the state to establish this boundary. The judgments of the superior court are before us as exhibits in the instant case. None was appealed. The state accurately described these judgments when it said in its opening brief:

> In every one of these cases the court has divided the accreted lands on the same formula: those accreted lands formed prior to statehood are the property of the private upland owner; those accreted lands formed since statehood are public beach and shore.

[fol. 45] The language of these judgments varies in minor respects. In some the 1889 line of ordinary high tide is related to a surveyed corner and described by metes and bounds; in others it is described as being a stated number of feet above the "line of mean lower low water," thus a standard set by the United States Coast and Geodetic Survey is recognized; in still others, the 1889 line is described with particularity by reference to the Washington Coordinate System, South Zone, as claimed by the state in the instant case. In practically all of the judgments the 1889 line as surveyed and described therein is judicially determined to be the line of "ordinary high tide where it existed on the 11th day of November, 1889, established by the commissioner of public lands." Thus over the years the only state constitutional court of general jurisdiction established a rule of property which has been relied upon and applied on many occasions when the state has sold tidelands pursuant to statutory authority.

Following the decision of this court in *Harkins* v. *Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957), the superior court judgments entered thereafter further described the 1889 line as the "line which the water impressed on the soil by

covering it for sufficient periods to deprive the soil of vegetation." This added nothing to the line which had already been surveyed and established. In *Shelton Logging* [fol. 46] *Co.* v. *Gosser,* 26 Wash. 126, 66 Pac. 151 (1901), this court had already considered the line of vegetation and the line of mean high tide to be the same. Further, in *Harkins, supra;* there was an unchallenged finding of fact equating "the line of ordinary high water" with the "line of mean high tide." No further description was necessary.

## Court Decisions

Two years after its adoption, the landmark case of *Eisenbach* v. *Hatfield,* 2 Wash. 236, 26 Pac. 539 (1891), brought Article 17 of the constitution to the Supreme Court for construction and interpretation. The five-man court[19] was unusually well qualified to consider it.[20]

Plaintiff, the owner of upland property abutting the high-water mark of Puget Sound, claiming he was entitled to certain littoral rights, sought to enjoin defendants from maintaining and using certain improvements upon tidelands in front of the property. The improvements had been erected prior to March 26, 1890, were in actual use for commerce, trade and business, and subject to purchase by defendants under Laws of 1889-90, § 11, p. 435. (See *supra.*) [fol. 47] At the outset, we emphasize, as does the *Eisenbach* opinion, that "riparian rights in the several states are settled by the respective states for themselves." The decision was made when the constitution was adopted in 1889 and confirmed by the admission of the state into the federal union upon an equal basis with other states.

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[19] See Chronological History of the Supreme Court of the State of Washington, 61 Wn.2d 792 (1963).

[20] Judge John P. Hoyt had been president of the constitutional convention; Judge Ralph O. Dunbar had been chairman of the committee to draft the constitutional provisions for state, school, and granted lands, which encompassed tidelands; and Judge T. L. Stiles, who write the dissent, actively opposed constitutional regulation of tidelands on the ground the doctrine was against sound public policy.

> The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows .... Art. 17, § 1, State Const.

The constitutional assertion of state ownership is clear and unambiguous. As Judge Anders said in his well-considered opinion, "it is scarcely necessary to look beyond our own constitution and laws for authority to guide us to a conclusion."

In the *Eisenbach* case, plaintiff contended that whatever may be the title of the state to the soil under tide water, he, by virtue of his contiguity to the water, had certain rights in the shore peculiar to himself. He claimed a vested property right (a) to wharf out opposite his upland and have unobstructed access to the navigable water in front of his property and (b) to acquire by accretion land that might thereafter be formed.

After a meticulous analysis of the authorities, this court said:

> The foregoing decisions of the highest judicial tribunal of the United States, without other or further [fol. 48] authority, would seem to settle, beyond controversy, the question of title to the tide lands of this state, and to leave no doubt whatever that they belong to the state in *actual propriety,* and that the state has full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the constitution of the state and the constitution of the United States; and, if this be true, it necessarily follows that no individual *can have any legal right* whatever to claim any easement in, or to impose any servitude upon, the tide waters within the limits of the state, without the consent of the legislature. (Italics ours.)

The court concluded:

> We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the state or its grantees to extend wharves in front of his land below high water mark.

The court did not completely resolve plaintiff's second contention in the *Eisenbach* case—his claimed vested right to future accretion. The court said:

> we are unable to see how one can have a *present* vested right to that which does not exist, and which may never have an existence. (Italics ours.)

The court did, however, point out that the authorities to the contrary were "based either upon statutes or local customs, and are therefore not precedents binding upon us." That which did not exist when *Eisenbach* was decided—accretion seaward of upland property—now exists. We conclude that its ownership is resolved by the *rationale* of *Eisenbach* and that accretion formed since November 11, 1889 is an addition to state-owned property, not to upland property. As the court said:

> [fol. 49] The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good.

Our conclusion is not startling. It is simply a reaffirmance of a rule of property established by many prior superior court decisions heretofore discussed, and of the rule relied upon over the years in a myriad of land transactions between individuals and between the state and individuals.

At the next session of the Supreme Court the questions discussed in *Eisenbach* were again submitted to and re-examined by the court in *Harbor Line Commissioners* v. *State,* 2 Wash. 530, 27 Pac. 550 (1891). The court said:

> The court is still of the opinion that, as against the state, a littoral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide.
>
> The somewhat careful examination which I have given this case has confirmed my opinion that at common law the sovereign power (resting in England in parliament) could take such lands without compensation, and absolutely exclude the littoral proprietors from any rights thereto.

The state's constitutional assertion of ownership in 1889 terminated any rights the upland owner may have had to future accretion. Thereafter, the possible rights of an upland owner are those that might be established by the legislature.

This conclusion is fortified by the court's opinion in [fol. 50] *Washougal, etc. Transp. Co.* v. *Dalles, Etc. Nav. Co.,* 27 Wash. 490, 68 Pac. 74 (1902), wherein the state's grantee of shorelands sought to claim shorelands created in part by erosion (the opposite of accretion) and by debris caught and held by pilings. The court held:

> It cannot be that shore lands created by the erosion of the banks of a stream within the boundaries of a private claim inure to the benefit of the state; nor can the state claim, as shore lands, fills in a river caused by artificial means.

In the instant case plaintiff's (respondent's) argument in support of the judgment of the trial court orbits around three decisions: *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U.S. 10, 80 L.Ed. 9, 56 Sup. Ct. 23 (1935), *Ghione* v. *State,* 26 Wn.2d 635, 175 P.2d 955 (1946), and *U.S.* v. *State*

*of Washington,* 294 F.2d 830 (1961). It was apparently the third decision which triggered this action.

We do not find the three cases apposite. *Borax, supra,* establishes the rule that mean high tide (the average height of all high waters through a complete tidal cycle) is the criterion for "ordinary high water." [21] The case does not involve the question of accretion.

[fol. 51] Some of the language in *Ghione, supra,* read without reference to the particular facts before the court, seems to lend weight to respondent's argument in support of the judgment. This case, however, involves the ownership of the bed of two rivers, first surveyed in 1865. River courses had changed gradually over the years; one was changed artificially in 1913. Finally one river ceased to flow when the level of the water of Lake Washington was lowered in 1915. The case does not involve tidelands. We have no quarrel with the decision as applied to the facts; we do not, however, deem it controlling of the instant case.

In *United States* v. *State of Washington,* 294 F.2d 830 (1961), certain lots in Grays Harbor abutting on the Pacific Ocean belonged to the federal government subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian. The lots were at all times part of the public domain until patented. The court applied federal law and determined that accretion belonged to the uplands owned by it subject to the trust patent. We do not question the federal government's right over its own property, but the rules applied by the United States Court of Appeals do not override the established rules of property of the sovereign state in a controversy between it and one of its citizens.

In conclusion, we hold that the state acquired ownership of tidelands in actual propriety November 11, 1889. The [fol. 52] property line is the line of ordinary high tide,

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[21] We are aware of the footnote reference in *Narrows Realty Co.* v. *State,* 52 Wn.2d 843, 329 P.2d 836 (1958), equating "the line of ordinary high tide" with "neap tides," but the reference is not necessary to the decision and is, therefore, dictum.

which we equate to mean high tide on that date. Littoral rights of upland owners were terminated. Upland owners have only those rights subsequently recognized by legislative enactment. All accretion subsequent to November 11, 1889 is owned by the state and may be sold or reserved as a public highway or public recreation area as the legislature shall determine.

The judgment is reversed and the cause remanded for entry of judgment not inconsistent with the views herein expressed.

It is so ordered.

Weaver, J.

We concur: Rosellini, C. J., Donworth, J., Finley, J., Ott, J., Hamilton, J., Hale, J.

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[fol. 53] No. 37583

Hill, J. (dissenting)—I find myself lost in admiration at the scholarship and erudition manifested in the majority opinion. However, all the legal signposts that I can read *and understand* point in the opposite direction, so I am compelled to dissent.

We must decide whether the westerly (seaward) boundary of Stella Hughes' property is the present mean high tide line, or whether it is the line of ordinary high tide as the state of Washington computes it to have been on November 11, 1889. It is really as simple as that.

Signpost 1: Location of plaintiff's westerly (seaward) boundary is a federal question.

The plaintiff traces her title to a federal patent issued before Washington became a state. This court recognized a long time ago the right of federal courts to ascertain the limit of federal grants. See *Washougal and LaCamas Transportation Co.* v. *Dalles, Portland and Astoria Navigation Co.*, 27 Wash. 490, 496, 68 Pac. 74 (1902). In *Borax*

*Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10, 80 L.Ed. 9, 56 S.Ct. 23 (1935), it was stated that when a federal patent is involved, the boundary between upland and tide-[fol. 54] land is necessarily a federal question. True, no accretions were involved, but it seems unlikely that this would have made any difference as to whether federal law should be applied.

Signpost 2: Federal law being applicable, the "shifting boundary theory" applies.

If federal law is applicable, then *United States* v. *State of Washington,*[1] 294 F.2d 830 (C.A. 9th 1961), cert. den. 369 U.S. 817 (1962), is decisive. That case holds that imperceptible accretions go with the uplands whenever title to the uplands is derived from the United States. The western or seaward boundary to the property involved[2] in that case was, as here, the line between uplands and tidelands. The present line of "mean high tide," which was defined as the average elevation of all high tides at a [fol. 55] given location through a complete tidal cycle of 18.6 years, was held to be that boundary. This definition was formulated by the United States Coast and Geodetic Survey and is part of what has been called the "shifting boundary theory." 2 Shalowitz, Shore and Sea Boundaries, 503 note 34.

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[1] It is interesting to note that in the cited case the state of Washington made all of the arguments it makes here for its fixed boundary of November 11, 1889, but found the Circuit Court of Appeals a forum less friendly to its idea of rewriting the law relative to accretions.

[2] The property involved: "Lots 3 and 4 of section 15 in township 18 north of range 12 west of the Willamette Meridian, adjacent to the Pacific Ocean in Grays Harbor County, Washington," belonged to the United States, subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian who died in 1930. In 1858, these lands were surveyed by the General Land Office, which established a meander line along and adjacent to the Pacific Ocean. The accretions which pushed the high-water mark seaward were held to belong to the United States subject to the heirs of Samson Johns, and not to the state of Washington.

This is the western or seaward line fixed by the trial court in this case, and it should be affirmed.

If this seems a ridiculously short and simple solution of the apparently complex problem with which the majority opinion deals, I can only say that it is the result dictated by common law,[3] and (as we have seen) by the federal law. It is a plain and well-traveled legal path. To arrive at the result the state desires (and the majority approves), a new, circuitous and rather devious route, rarely explored, must be followed. This is conceded in the state's brief when it says:

> It is a rare occurrence, of course, when a state denies a riparian owner title to tidelands[4] that have become fast lands by slow and imperceptible accretion, but at least two other states have done so. . . .

I would extend my discussion to point out four interesting circumstances that have been lost sight of, or at least [fol. 56] have been obscured, to date:

1. We have not previously defined the exact meaning of the phrase "line of ordinary high tide," as used in Art. 17, § 1 of our state constitution.

The case of *Harkins* v. *Del Pozzi,* 50 Wn.2d 237, 240, 310 P.2d 532 (1957) states:

> The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes. . . .

However, the authority cited for this proposition is an Idaho case which was actually concerned with the ordinary

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[3] ". . . At common law the person whose land is bounded by sea, lake or river owns any additions thereto resulting from imperceptible accretion." *United States* v. *State of Washington, supra* (p. 834); *Shively* v. *Bowlby,* 152 U. S. 1, at page 35, 38 L.Ed. 331, 14 S.Ct. 548 (1894).

[4] I would interpolate "former" before "tidelands."

high water mark on Lake Pend Creille. The Circuit Court of Appeals rejected such a definition in *United States* v. *State of Washington, supra,* saying:

> In the case of tidal waters such as are involved here, the high-water mark means the line of high water as determined by the course of the tides, not as determined by physical markings made upon the ground by the water. The latter method of making this determination, which was followed by the district court, is appropriate only in the case of streams and other non-tidal waters which have no absolute ascertainable level because of variations of flow from a multitude of causes. (p. 834)

There is also dictum in *Narrows Realty Co. Inc.* v. *State of Washington,* 52 Wn.2d 843, 844, 329 P.2d 836 (1958), which defines the phrase as:

> " . . . line of 'ordinary high tide,' that is, the usual or ordinary high-water mark, the limit reached by the 'neap tides,' those tides which happen between the full [fol. 57] and change of the moon twice in every 24 hours . . . " 30 Words & Phrases (Perm. ed.) 253.

Neither of these cases involved imperceptible accretions or were concerned with the problem of possible shifting boundaries.

The question of whether the "line of ordinary high tide" is a shifting line is squarely presented here, and I believe the definition of this constitutional phrase should (and perhaps must) be identical with the definition of "mean high tide" heretofore quoted and adopted by the federal courts.

2. The state's ownership of

> the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows . . . [Const. art. 17, § 1]

is not questioned. Any rights of riparian or littoral owners in such "beds and shores" have properly been held to present a question of local law. Such a case was *Eisenbach* v. *Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891), on which the state and the majority place great reliance. The case dealt solely with the relative rights of the state and the upland owner in the tidelands, the court holding that the upland owner had no right to extend a wharf beyond the high-water mark. The court specifically declined to decide whether plaintiff would be entitled to future accretions to his land.

No question, as to the complete control of the state over [fol. 58] "beds and shores" of all navigable waters is raised. Hence, the *Eisenbach* case has, it seems to me, no application.

The state had, on November 11, 1889, and the state has today and has had at all intervening times, title to the beds and shores of all navigable waters of the state lying seaward of the line of ordinary high tide (properly equated to mean "the line of mean high tide," as defined herein). The state loses no tidelands by the shifting boundary, because the accreted land has become "fast land," and it always has had title to the shore and beach between ordinary high tide (mean high tide) and extreme low tide. But, by the fixed-boundary rule, which Washington and "at least two other states" have invented, the upland owner loses the "fast land," which has been added to his upland by slow and imperceptible accretion, and his contact with the line of mean high tide which, in many instances, may have been the reason for the acquisition of the property.

It is apparent also that the purpose of the state is not primarily to make a greater area available for public use, but to dispose of such accreted lands to private individuals and put a new upland owner between the grantees of the original upland owner and the line of mean high tide. That the state does not consider accretion as shore or beach, is evidenced by its sale thereof, for the state certainly would [fol. 59] not disregard the statutory declaration that

> [S]hore and beach of the Pacific Ocean, . . . between ordinary high tide [mean high tide] and extreme low tide . . . shall remain forever open to the use of the public. [RCW 79.16.170]

and that no part thereof "shall ever be sold, conveyed, leased or otherwise disposed of." (RCW 79.16.171)

3. The really pertinent decision in Washington is not the *Eisenbach* case, which has nothing to do with imperceptible accretions, but the case of *Ghione* v. *State,* 26 Wn.2d 635, 175 P.2d 955 (1946). The state asserted there, as it does here, that it was entitled to all lands covered by navigable waters in 1889. The state also contended that it was entitled to all lands submerged by navigable waters subsequent to 1889.

The court discussed a number of cases—including *Eisenbach* and an 1899 statute on accretions (cited here by the majority—before adopting a shifting boundary theory which vested title to imperceptible accretions in the upland owner. The majority seeks to distinguish the *Ghione* case because it involved a river, but the court there believed that the shifting boundary theory applied "to both tidewaters and fresh waters," and there is no apparent reason for distinguishing between them.

4. No consideration has been given to the effect of the fixed boundary theory where there has been an erosion instead of an accretion. We can only speculate as to how [fol. 60] the majority opinion would read if this were an erosion case. At certain places, the 1899 line of ordinary high tide or mean high tide is now a long way out in the Pacific Ocean, in consequence of erosion, and the upland owner has seen his upland become tideland to which he has heretofore thought he had no title. Under the majority rule, the upland owner would continue to have title to the 1889 line, and the public, seemingly, would have to swim to enjoy its "highway" and beach rights. Only under the shift-

ing boundary rule will the rights of the public always be preserved in the property in the beds and shores of all navigable waters in the state, up to and including the line of ordinary high tide—"in waters where the tide ebbs and flows."

I would follow the federal cases, adhere to the shifting boundary rule, and affirm the trial court.

Hill, J.

I concur with Judge Hill.

Hunter, J.

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[fol. 62]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

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STELLA HUGHES, Respondent,

vs.

STATE OF WASHINGTON, Appellant.

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PETITION FOR RE-HEARING EN BANC BY RESPONDENT

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the State of Washington:

The respondent, Stella Hughes, presents this petition for a re-hearing in the above entitled cause, and in support thereof respectfully shows:

1. The appeal in this cause was argued before this court on January 29, 1965.

2. On January 20, 1966 this court rendered its decision in favor of appellant and against respondent, reversing

the judgment of the Superior Court of Pacific County, Washington. The respondent seeks a re-hearing upon the following grounds:

A

Federal Law Is Determinative of the Question Herein Presented

"The question as to the extent of this Federal grant, that is, as to the limit of the land conveyed where the boundary between the upland and the tide land, is necessarily a Federal question." Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935), and U.S. v. The State of Washington, 294 Fed. 2nd 830 (9th Circuit, 1961).

Granted that accretion was not expressly involved in [fol. 63] the Borax case, yet the court held that the boundary between tide lands granted by the state and upland granted by the United States was the line of high tide by the judgment affirming the Circuit Court's reversal of the District Court (74 F. 2nd, 901), and ordering determination of the actual line of mean high tide clearly referred to the line as it then existed, regardless of the intervening modifications by accretion or erosion. In the same case, on page 907, this court of appeals said,

> "The question of the mean high tide line is one of fact, and the effect of the shifting of that line on the rights to tide lands and upland are well settled."

In Borax, Ltd., supra, the court clearly stated,

> "The tide land extends to the high water mark . . . this does not mean, as petitioners contend, a factual mark made upon the ground by the water; it means the line of high water as determined by the course of the tides."

The Supreme Court simply followed the Circuit Court of Appeals in its previous opinion reported in 74 F. 2nd, page 904:

> "The appellant, however, contends for the rule that the boundary line between the tide lands and the upland is determined 'by definite mark upon the ground which has been left by the tide'. This rule as to a definite mark is applicable to the high water line of streams, but not to a boundary line of tide waters."

The Supreme Court as well as the Circuit Court of Appeals took judicial notice of the fact that astronomical influences produce a complete tidal cycle every 18.6 years, and held that "ordinary high water should be taken as the mean elevation of all tides at the point in question," and directed that the "ordinary high water mark" should be ascertained by locating on the ground the line of that mean [fol. 64] elevation. 296 U.S. 10, 26-27; 74 F. 2nd 901-906.

Judge Hamley, speaking for the court in United States of America v. State of Washington, 294 Fed. 2nd 830, stated flatly, that while no question of accretion was involved in Borax, the principle there announced was equally applicable where the problem is one of determining whether imperceptible accretions go with the upland.

> "Therefore, contrary to the majority opinion herein, the Federal Court has also concluded that 'State law does not govern.' If the upland owner is entitled to the imperceptible accretions, it is because this is an attribute of title reserved to, or obtained by, grant from the government." (294 Fed. 2nd 831)

The state may not take from riparian owners, rights given to them by Federal patent; see Packer v. Bird, 137 U.S. 661-669 (1891), where the court, in considering the question whether a Federal patent bounded by a navigable river gave any rights below the high water mark, said,

> "Whatever incidents or rights attached to the ownership of property conveyed by the government will be determined by the states *subject to the conditions that their rules do not impair the efficacy of the grants or*

*the use and enjoyment of the property by the grantee.*" (emphasis supplied)

Appellant, in his brief on page 38, argues that the Government's rights over its own property, whatever they may be, should not be permitted to override the sovereign rights of the state over its property. This conclusion, however, was met squarely and decided to the contrary by the Circuit Court of Appeals, 294 Fed. 2nd 830. It may be argued that Judge Hamley was mistaken, but his decision exists, and permanently.

[fol. 65] B

The Law of the State of Washington Follows the Federal Rule and the Common Law

Article XVII Tide Lands

1. Declaration of State Ownership. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

2. Disclaimer of Certain Lands. The State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States; Provided, the same is not impeached for fraud.

In Scurry v. Jones, 4 Wash. 468, the court held,

"The disclaimer by the state (Const. Art. 17, sec. 2) of all title in and claim to all tide, swamp and overflowed lands patented by the United States' while not in terms confirmatory of titles so acquired, is substan-

tially a grant to the patentees of the interest of the state in such lands."

The disclaimer clause was again invoked by the court in Cogswell v. Forrest, 14 Wash. 1, in which the court held,

"The state can assert no title to patented tide lands although lying below the line of ordinary high tide."

The appellant in this case was the Commissioner of Public Lands, and it is interesting to note the statement of the court on page 2:

"It is contended by the appellants that the meander lines run along the shores of bodies of water by United States surveyors are not lines of boundary, but lines run merely to locate the shore line and determine the area of the upland from which the price is computed, and that the body of water along which the meander lines are run is the true boundary; and that in this state the boundary line of lands adjoining tidal waters [fol. 66] is that prevailing at common law: to-wit, *mean high water mark.*"

In Washougal Transportation Co. v. Dalles, etc. Nav. Co., 27 Wash., page 490, on page 496, it is said:

"What title or right passes under a grant of lands made by the United States is a Federal question, and the judgment of a State Supreme Court is within the appellate jurisdiction of the Federal Supreme Court." Shively v. Bowlby, 152 U.S. 1 (14 Sup. Ct. 548)

The majority herein concludes that Ghione v. State, 26 Wash. 2nd 635, is not apposite since tide lands as such were not involved, and yet the very argument of the Attorney General in that case is the same as advanced in the instant case. The court, in answering that argument, refers to Article 17, section 1 (supra) where it is stated in plain and unmistakable language,

"Includes the beds and shores of all navigable waters . . . where the tide ebbs and flows . . . banks of all navigable rivers and lakes."

It also states on page 647 that the conclusion sought for by the Attorney General is contrary to the universal and convenient rule (page 645),

"This rule of accretion is everywhere admitted, and applies to both tide waters and fresh waters, and further holds that the general principles of American law relating to control over the beds and shores of its navigable waters is not necessarily inconsistent with the established rule that water boundaries vary with the water line." (page 648)

To interpret this constitutional language governing all navigable waters as having diverse results may be termed illogical. In the case of New Whatcom v. Fairhaven Land Co., 24 Wash., on page 500, the court clearly stated,

"The provision of Article 17, section 1 of the Constitution was evidently for the purpose of establishing the right of the state to the beds of all navigable [fol. 67] waters in the state; whether lakes or rivers, fresh or salt, to the same extent the Crown had in England in the sea and in the arms and inlets thereof, and in the tidal rivers; and to eliminate the distinctions existing under the rule of the common law in this respect."

The court further states, on page 501, that this Article

"Expressly protects all persons in asserting their claims to vested rights."

It also states,

"The provisions of Article 1, section 16 of the Constitution protect private property from confiscation for public use."

Decided subsequently to the Ghione case are Harkins v. Del Pozzi, 50 Wash. 2nd 237 (1957), and Christensen v. Gensman, 53 Wash. 2nd 313 (1958).

The Harkins case involved the boundary line between the state's grantee of tide lands and the upland owner, and the court, on pages 240-241, said,

> "At the time of statehood, the State of Washington acquired from the Federal government the ownership of the beds and shores of all navigable waters in the state, up to and including the *line of ordinary high tide in waters where the tide ebbs and flows.* Art. XVII, sec. 1, State Constitution.
>
> "The conveyance from the State of Washington of second-class tide lands adjacent to government lot 3 to respondent's predecessor conveyed only the title which the state had, namely, to the line of ordinary high tide."

and since it could not determine the extent of the boundary line prior to 1889, held the meander line when located landward of the line of ordinary high tide is not the true boundary line between the upland and the tide lands; the true boundary in such cases being the line of ordinary high tide.

In the Christensen case arose the question of the bound- [fol. 68] ary line between the tide land and upland on the Wallicut River in an area affected by the ebb and flow of the tide, and the case was remanded for a new trial limited to the determination of the line of ordinary high tide on the south side of the Wallicut River. This case was tried and decided upon the theory (the state being a party) that the boundary line in tidal waters was determined by the line of mean high tide. Here, as in the other cases discussed, the court is referring to the *present* line of ordinary high tide, and not as it may have been determined to be in 1889.

We have been unable to find any act of the legislature that applies only to river bed lands and not to tide lands. On the other hand, Article 17 applies to both tide and shore lands, as do all other legislative enactments. As the court pointed out in the Ghione case, the accretions mentioned in the tide land acts are not accretions to the upland, but are accretions at the lower water line.

If the Ghione case is to be restricted to rivers and streams, then the majority has adopted a new rule applying only to tide lands. It should be remembered that the majority of rivers and streams are affected by the rise and fall of the tide, and we have the anomalous result that water boundaries of rivers and lakes shall be determined by one rule and tidal waters by another rule. In the future the majority opinion could be reasonably restricted to tidal waters bordering only upon the Pacific Ocean.

Implicit in the majority opinion is the reasoning that there is a distinction between the rights of the Federal Government and the rights of its patentees. Equally im-
[fol. 69] plicit is the reasoning that rights once vested in a patentee as to the boundaries of his land vary from the rights of the government as the original owner. To us it appears reasonable that the phrase "vested rights" means fixed and permanent. If these rights vested in the patentees prior to 1889, it is logical to presume that neither the Federal Government nor the State of Washington can interfere with these rights.

## C

## State Policy

Admittedly neither the briefs nor arguments of counsel adverted to the fact that all deeds from the State of Washington to the upland owner of lands described by laws of 1929, Chap. 78, as

> ". . . on the land side of the inner boundary of the highway reservation made by Chap. CV and CX, Laws

of 1901, same being a line of ordinary high tide as the same is now located, or as it may hereafter exist."

describe these lands as follows:

"Tidelands of the Second Class lying above the line of ordinary high tide as this same is now located, or as it may hereafter exist."

Obviously this description is both inept and inexact.

As an example, one of the exhibits introduced by the state is a judgment of the Superior Court of Grays Harbor County entitled "Ralph Minard et al. v. State of Washington, No. 47939." The line described as the line of ordinary high tide as of November 11, 1889, and as surveyed by the state in Parcels "B" through "H" actually extends westerly into the Pacific Ocean for over a mile north and south to an actual depth of several fathoms beyond the line of extreme low tide. The state recognized its dilemma, but sold this stretch of land as if it actually existed. It is difficult [fol. 70] to equate the state's argument that a fixed boundary exists on tidal waters, and its practice of issuing deeds containing a shifting boundary.

D

Importance of Question

It is finally submitted that a re-hearing should be granted; first, because it is a case of first impression before this court, and secondly, it involves incalculable economic and social interest for hundreds of title holders.

Respectfully submitted,

Charles B. Welsh, Attorney for Respondent.

[fol. 71]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

Department .....

[Title omitted]

ORDER CALLING FOR ANSWER TO PETITION FOR REHEARING—
February 24, 1966

The Court having considered the respondent's petition for rehearing herein,

It Is Ordered that the Clerk mail to the attorneys of the appellant a copy of the original petition, with a request that they file three copies of an answer thereto within fifteen days and serve a copy thereof on opposing counsel.

Dated this 24th day of February, 1966.

By the Court:

Hugh J. Rosellini, Chief Justice.

[File endorsement omitted]

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[fol. 73]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

STELLA HUGHES, Respondent,

v.

STATE OF WASHINGTON, Appellant.

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ANSWER TO PETITION FOR REHEARING—March 11, 1966

By order entered February 24, 1966, this court has requested an answer by the State of Washington to Respondent Stella Hughes' Petition for Rehearing.[1]

The Petition for Rehearing should be denied.

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[1] This court's opinion is reported as Hughes v. State, 67 W.D.2d 787, 410 P.2d 20 (1966).

I

The function of a petition for rehearing is to bring to the court's attention, for correction, errors of fact or law [fol. 74] assertedly made by the court in deciding a case; it is not the office of a petition to reopen a case for reargument and reconsideration of points, authorities, or matters already fully considered by the court[2] or to interject new issues into a case.[3] One of the best statements of the purpose and scope of petitions for rehearing is found in Rule 18(1) of the New Mexico Supreme Court:

> The motion for rehearing shall be directed to the opinion of the court, and shall distinctly specify wherein the same is erroneous; but shall not renew contentions previously argued and submitted and expressly disposed of except to invoke an earlier decision, a statute or a rule of court deemed controlling and previously overlooked. The motion may also direct the court's attention to fundamental or jurisdictional error not previously presented, and may renew any contention deemed controlling and not expressly passed upon.

[fol. 75]

II

Stella Hughes, by her petition for rehearing, sets forth four grounds to justify a rehearing.

*First,* that federal law as announced in *Borax, Ltd.* v. *Los Angeles*[4] and *United States* v. *Washington,*[5] is con-

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[2] Louisell & Degnan, *Rehearing in American Appellate Courts,* 44 Calif. L. Rev. 627 (1956); 5 Am. Jur. 2d *Appeal & Error* § 978 (1962) 5 C.J.S. *Appeal & Error* § 1410 (1958).

[3] State *ex rel.* Milwaukee Terminal Ry. v. Superior Court, 54 Wash. 365, 377, 103 Pac. 469, 104 Pac. 175 (1909); State v. Hazzard, 76 Wash. 586, 137 Pac. 143 (1913); Holohan v. Melville, 41 Wn.2d 380, 408, 249 P.2d 777 (1952); Nostrand v. Little, 58 Wn. 2d 111, 361 P.2d 551 (1961).

[4] 296 U.S. 10 (1935).

[5] 294 F.2d 830 (9th Cir. 1961).

trolling and renders a consideration of state constitutional and statutory law superfluous.[6]

*Second,* that the court's decision on state law overlooked or is inconsistent with its prior decisions[7] in *Scurry* v. *Jones,*[8] *Cogswell* v. *Forrest,*[9] *Washougal Transp. Co.* v. *Dallas, Etc. Nav. Co.,*[10] *New Whatcom* v. *Fairhaven Land* [fol. 76] *Co.,*[11] *Harkins* v. *Del Pozzi,*[12] and *Christensen* v. *Gensman.*[13]

*Third,* that the court did not consider the language of deeds given by the state under authority of chapter 78, Laws of 1929, particularly as applied to the Ralph Minard property in Grays Harbor County.

*Fourth,* that the importance of the questions before the court alone justify a rehearing.

None of the grounds set forth by Petitioner Stella Hughes justifies a rehearing.

III

The petitioner's first and fourth grounds constitute nothing more than a request that this court reopen the case for reargument and reconsideration of matters fully considered and decided by the court. This is not the purpose of a rehearing, as we have already seen. (There can

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[6] Petition for Rehearing 1-3.

[7] Petition for Rehearing 4-8.

[8] 4 Wash. 468, 30 Pac. 726 (1892).

[9] 14 Wash. 1, 43 Pac. 1098 (1896).

[10] 27 Wash. 490, 68 Pac. 74 (1902).

[11] 24 Wash. 493, 64 Pac. 735 (1901).

[12] 50 Wn.2d 237, 310 P.2d 532 (1957).

[13] 53 Wn.2d 313, 333 P.2d 658 (1958).

be no doubt about the fact of full consideration. Witness the [fol. 77] oral opinion of the trial court, the briefs of counsel, and the majority and dissenting opinions in this cause.)

The petitioner's second ground for rehearing, insofar as it relates to the cases of *Washougal Transp. Co.* v. *Dallas, Etc., Nav. Co.*[14] and *Harkins* v. *Del Pozzi*[15] must be similarly dismissed. Both cases were expressly brought to the attention of the court and cited by the majority or dissenting opinions or both.

It is true that the remaining cases were not expressly cited to the court. Nonetheless their citation now does not justify a rehearing because none of the cases have any bearing on the matters in issue in this case. *Scurry* v. *Jones*[16] and *Cogswell* v. *Forrest*[17] were concerned with the "disclaimer clause" of section 2, article 17 of the constitu- [fol. 78] tion. The court held the clause operated as a grant of tidelands to holders of upland patents that purportedly included tidelands. *New Whatcom* v. *Fairhaven Land Co.*[18] holds that a riparian owner on a *non-navigable* stream is entitled to compensation for the diverting of water from the stream for general domestic and municipal use. *Christensen* v. *Gensman*[19] (contrary to petitioner's suggestion) was not tried on any theory different than the one here urged by the State. The dikes along the river forestalled any issue of accretion, and following this court's judgment, the plaintiff proposed to locate the 1889 line of ordinary high tide in accordance with the rule of *Harkins* v. *Del Pozzi*.[20] Thereafter the case was settled without further

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[14] 27 Wash. 490, 68 Pac. 74 (1902).

[15] 50 Wn.2d 237, 310 P.2d 532 (1957).

[16] 4 Wash. 468, 30 Pac. 726 (1892).

[17] 14 Wash. 1, 43 Pac. 1098 (1896).

[18] 24 Wash. 493, 64 Pac. 735 (1901).

[19] 53 Wn.2d 313, 333 P.2d 658 (1958).

[20] 50 Wn.2d 237, 310 P.2d 532 (1957).

[fol. 79] trial because all parties agreed to the location of the line of ordinary high tide.[21]

The petitioner's third ground for rehearing is apparently a suggestion that counsel have overlooked facts about past administrative action by the state which has a bearing on the court's decision. If true, of course, the court would want to set the record straight.[22] As we shall at once see, no fact has been overlooked by counsel or the court.

The first contention petitioner makes is that the Commissioner of Public Lands, when making sales of accreted lands under authority of chapter 78, Laws of 1929, referred [fol. 80] to the lands as "tidelands of the second class" (which they once were) rather than as something else. The contention is probably factually true although these facts are not a matter in the record before the court. But in any event it is hard to see how the commissioner's choice of descriptive words, rather than some alternative wording (such as "accreted tidelands" or "accreted uplands"), has any bearing on the issues decided here by the court. No matter what terminology was used, the state most definitely claimed the accreted land and asserted domination over it even to the extent of selling it.

The second contention of petitioner involves a mistake of fact by the petitioner herself. She refers to the 1889 line of ordinary high tide as fixed by the Grays Harbor Superior Court in the case of *Minard* v. *State of Washington,* Cause No. 47939,[23] and asserts that this line is located in "several

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[21] Matters occurring after the filing of this court's opinion are not a matter of public record. We set them out here only to answer the petitioner's assertions that go beyond the public record (and only after refreshing our memory by reviewing our own litigation file).

[22] *E.g.* Union Wharf Co. v. Katz, 11 Wash. 407, 39 Pac. 647 (1893), *reversing original opinion,* 8 Wash. 389, 36 Pac. 276 (1894); Dabney v. Stearns, 73 Wash. 583, 132 Pac. 400 (1913); Armstrong v. Burkett, 104 Wash. 476, 480, 180 Pac. 873; Cooley v. Ben Paris Sporting Goods & Recreation Co., 107 P.2d 347 (Wash. 1940).

[23] The judgment in the Minard case is part of Defendant's Exhibit No. 2, Case No. 42.

fathoms [of water] beyond the line of extreme low tide." [fol. 81] Petitioner is simply mistaken. The actual location of the line is shown on Map 4 to Defendant's Exhibit 5. The area in question (now Ocean Shores) is the one area where the building up of land by accretion has been most pronounced.

## IV

### Conclusion

A petition for rehearing is a part of the appellate procedure authorized by the rules of this court.[24] The right to file such a petition therefore is not to be deemed an empty formality as though such petitions will as a matter of course be denied.[25] Yet we must be cognizant of the fact pointed out by Justice Frankfurter, an acknowledged authority on appellate procedure, that:[26]

> [fol. 82] Rehearings are not a healthy step in the judicial procedure. . . . If petitions for rehearing were justified, except in rare instances, it would bespeak serious defects in the work of the courts of appeals, an assumption which must be rejected.

We have accordingly reviewed the petition now before the court in the light of those rules which have been accepted by this and other appellate courts to prevent petitions for rehearing from becoming mere formalities, rejected as a matter of course. There is no basis, in the light of these rules, for granting a rehearing.

We note only in concluding, that if it were the office of a petition for rehearing to reopen a case for reargument and reconsideration of matters already argued and

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[24] Rule 50, Rules on Appeal.

[25] *Cf.* Flynn v. United States, 99 L. Ed. 1298 (1955) (opinion of Justice Frankfurter in chambers).

[26] Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247, 270 (1953).

decided, nothing would be gained by reopening this case. We have nothing further to add to what we have already said and argued; the petitioner has nothing further to add that in any way affects the court's decision, as we have seen above; and the thorough and scholarly opinion of the court itself completely dispels any intimation that court was not [fol. 83] fully informed on the law and issues in this case.

Respondent Stella Hughes' Petition for Rehearing should be denied.

Respectfully submitted,

John J. O'Connell, Attorney General, By Harold T. Hartinger, Assistant Attorney General, Attorneys for Appellant.

March 11, 1966.

Temple of Justice, Olympia, Washington 98501, Telephone 753-5318, Area Code 206.

[fol. 84] Affidavit of Service (omitted in printing).

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[fol. 88]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—April 14, 1966

The Court having considered the respondent's petition for a rehearing herein together with the appellant's answer thereto, and a majority of the Judges being of the opinion that it should be denied,

It Is Ordered that the petition be and it is hereby denied.

Dated this 14th day of April, 1966.

By the Court:

Hugh J. Rosellini, Chief Justice.

67 W.D.2d 787

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[fol. 89]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

Pacific County No. 14546

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STELLA HUGHES, Respondent,

v.

THE STATE OF WASHINGTON, Appellant.

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REMITTITUR—April 14, 1966

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 20, 1966, became the final judgment of this court in the above entitled case on April 14, 1966. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Three Hundred Eighteen and 61/100 ($318.61) Dollars in favor of appellant and against respondent.

The Petition for Rehearing was Denied by an Order filed April 14, 1966.

cc: Court Reporter; Hon. John J. O'Connell; Mr. Harold T. Hartinger; Mr. Laurel L. Tiller; Mr. Charles B. Welsh.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 93] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 94]

SUPREME COURT OF THE UNITED STATES

No. 339—October Term, 1966

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STELLA HUGHES, Petitioner,

v.

WASHINGTON.

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ORDER ALLOWING CERTIORARI—January 9, 1967

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.